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3:01-CV-01206 BANC OF AMERICA V. APOLLO FISHERIES

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CLERK, U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 BY *[Signature]* DEPUTY

6 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 7 BANC OF AMERICA SPECIALTY
 FINANCE, INC. et al, CASE NO. 01 cv 1206 BTM (LSP)

8 Plaintiff,

9 vs.

10 APOLLO FISHERIES SERVICE, INC. et
 al,

11 Defendant.

**BRIEF IN SUPPORT OF DISMISSAL
 OF CONTEMPT CHARGE**

Date: November 16, 2001

Time: 9:00 a.m.

13 TO: PLAINTIFF UNITED STATES OF AMERICA AND ITS ATTORNEYS OF
 14 RECORD, PATRICK J. O'TOOLE, U.S. ATTORNEY AND Assistant U.S. Attorney
 GEORGE AGUILAR:

15 PLEASE TAKE NOTICE that the defendant NATALIE CINTAS-GLADNICK
 16 makes the following argument in support of her motion to dismiss the contempt charge:

17 **I. INTRODUCTION**

18 This Court has tried Natalie Cintas-Gladnick ("Ms. Cintas") for several counts
 19 related to alleged contempt of court. That trial was without a jury because this Court
 20 announced that the maximum sentence it would impose would be six months of
 21 custody or less. However, Ms. Cintas never waived jury.

23 This Court acquitted Ms. Cintas of all counts related to willfully violating a court
 24 order. However, this Court then found beyond a reasonable doubt that Ms. Cintas
 25 perjured herself when she stated in the Cintas Declaration that she had (a)
 26 "segregated" the \$98,080.00 and that she had (b) "not utilized funds received from the

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1 sale of [Bank of America's] collateral to pay any other debts."

2 This Court has now asked for briefing on whether it may punish Ms. Cintas
 3 under the contempt laws for that perjury. Ms. Cintas argues herein that this Court may
 4 not hold her in contempt because the record does not establish an actual obstruction
 5 of justice by Ms. Cintas in or near the presence of the court and, thus, she was entitled
 6 to a jury trial. Therefore, Ms. Cintas argues that this Court should dismiss this case.
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8 **II. FACTS**

9 On July 30, 2001 the plaintiffs ("Bank of America") filed an Application for Ex
 10 Parte Application for Writ of Possession and Temporary Restraining Order
 11 ("Application"). (Clerk's Docket 11.) That Application specified certain boats and
 12 engines as the "Collateral" that Bank of America sought, but it did not ask for any relief
 13 related to the \$98,080.00 from the sale of the "Frantz Boat."

14 On August 1, 2001, the defendants filed the declaration (the "Cintas
 15 Declaration") that forms the basis of this Court's Notice of Contempt Hearing, filed on
 16 August 21, 2001, in opposition to the Application. The portion of the Cintas
 17 Declaration that the Court later found to be false related only to the \$98,080.00 from
 18 the sale of the "Frantz Boat." On August 3, 2001, this Court granted a Temporary
 19 Restraining Order for Bank of America, and denied only the application for a writ of
 20 possession.

21 On August 8, 2001, this Court held a hearing on Bank of America's application.
 22 At that hearing, counsel for Ms. Cintas argued that Bank of America had "not sought"
 23 any relief related to the \$98,080.00 from the sale of the "Frantz Boat." This Court then
 24 granted the all the relief Bank of America asked for, the application for a writ of
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1 possession and turnover order for the specified collateral, including the \$98,080.00.

2 The following day, August 9, 2001, Ms. Cintas-Gladnick did not pay the
3 \$98,080.00. The proof in this case was that she did not have the \$98,080.00 at that
4 time, but that she had the ability to borrow that money within a few days. On August
5 10, 2001, Bank of America asked the Court for attachment against Ms. Cintas. (Ex.
6 16; page 40.) On that same date this Court granted that relief. Within several
7 business days Ms. Cintas paid the \$98,080.00 to Bank of America after borrowing the
8 funds.

10 **III. MS. CINTAS WAS ENTITLED TO A JURY TRIAL**

11 The Congress has enacted several statutes to ensure that a person charged
12 with contempt is entitled to receive a jury trial under certain circumstances. In United
13 States v. Pyle, 518 F. Supp 139 (E.D. Penn.), the court examined at length the
14 legislative history and historical underpinnings of that right. According to the Pyle
15 court, 18 U.S.C. § 401, 402, and 3691 guarantee a jury trial to anyone who commits an
16 act that is alleged to be in contempt of court if that act is also a crime, unless that act
17 disobeys a court order or is in or so near the presence of the court that it obstructs the
18 administration of justice. That right is "intended to end an abuse of the contempt
19 power in which, in some circumstances, persons were prosecuted for contempt of
20 injunctions instead of violations of criminal laws . . . and were thus deprived of their
21 right to trial by jury." Id. at 146.

22 Title 18 U.S.C. § 401 provides, in whole, as follows:

23 A court of the United States shall have power to punish by
24 fine or imprisonment, at its discretion, such contempt of its
25 authority, and none others, as--

26 (1) Misbehavior of any person in its presence or so near

1 thereto as to obstruct the administration of justice;

2 (2) Misbehavior of any of its officers in their official
3 transactions;

4 (3) Disobedience or resistance to its lawful writ, process,
5 order, rule, decree, or command.

6 Title 18 U.S.C. § 402 provides, in whole, as follows (emphasis added):

7 Any person, corporation or association willfully disobeying
8 any lawful writ, process, order, rule, decree, or command of
9 any district court of the United States or any court of the
10 District of Columbia, by doing any act or thing therein, or
11 thereby forbidden, **if the act or thing so done be of such
character as to constitute also a criminal offense under
any statute of the United States or under the laws of any
State in which the act was committed, shall be prosecuted
for such contempt as provided in section 3691 of this
title and shall be punished by a fine under this title or
imprisonment, or both.**

12
13 Such fine shall be paid to the United States or to the
14 complainant or other party injured by the act constituting the
15 contempt, or may, where more than one is so damaged, be
16 divided or apportioned among them as the court may direct,
17 but **in no case shall the fine to be paid to the United
States exceed, in case the accused is a natural person,
the sum of \$ 1,000, nor shall such imprisonment exceed
the term of six months.**

18 Section 3691 provides for a jury trial if the act constituting the alleged contempt
19 is also a crime, unless that act disobeys a court order or is in or so near the presence
20 of the court that it obstructs the administration of justice. Thus, § 402 in combination
21 with § 3691 provides that contempt cases under section 402 are misdemeanors with a
22 maximum six-month custodial sentence with a jury trial if the act is also a crime, such as
23 perjury.

24 In this case this neither § 401(2) nor § 401(3) can apply to an act of perjury.
25 First, Ms. Cintas is not "an officer" and did not act in an "official transaction." See,
26 Camera v. United States, 350 U.S. 399 (1959) (Even attorneys are not "officers" under
27 § 401(2).) Second, the Cintas Declaration was not filed in "disobedience or resistance"

1 to any court "writ, process, order, rule, decree, or command." Thus, the only question
 2 is whether the Cintas Declaration was "misbehavior of any person in its presence or so
 3 near thereto as to obstruct the administration of justice."

4 In this case, Ms. Cintas signed the declaration in her office and faxed it to her
 5 attorney. Later, her attorney filed the declaration. Thus, her signature was not in or so
 6 near the presence of the court that it obstructs the administration of justice. Although
 7 counsel for Ms. Cintas can find no cases directly on point (a party signing a declaration
 8 that an attorney later files in court), that phrase has been construed as imposing a
 9 geographical, as opposed to a causal, limitation on a court's contempt power under §
 10 401(1). Nye v. United States, 313 U.S. 33, 48 (1941).

11 In Nye, the plaintiff (Elmore) brought an action against the defendants alleging
 12 that his son died as the result of the use of a medicine manufactured by the
 13 defendants. Elmore was described as "illiterate and feeble in mind and body." Id. at
 14 39. Respondents, Nye and Mayers, through the "use of liquor and persuasion,"
 15 induced Elmore to dismiss the suit. The Court, after describing respondents' conduct as
 16 "highly reprehensible," held that because it occurred more than 100 miles from the
 17 courthouse, it was insufficient to satisfy the geographical limitation embodied in §
 18 401(1). Id. at 49, 52. Thus, under that ground this Court may dismiss the contempt
 19 charge against Ms. Cintas.

20 Furthermore, the United States Supreme Court has held that perjury alone will
 21 not constitute contempt of court; in addition to the elements of perjury the court must
 22 also find actual obstruction of the judicial proceedings. In re Michael, 326 U.S. 224
 23 (1945) (Predecessor statute.) The In re Michael Court in that case noted that
 24 legislative intent

25
 26 reveal[s] a Congressional intent to safeguard Constitutional
 27 procedures by limiting courts, as Congress is limited in
 28 contempt cases, to "the least possible power adequate to
 the end proposed." Anderson v. Dunn, 6 Wheat 204, 231

The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury." [Id. at 227.]

4 The Supreme Court later interpreted the second element required to support a
5 contempt conviction under the present statute, § 401(1), identically: to constitute
6 contempt the perjury must amount to an "*actual obstruction of justice*." In re McConnell,
7 370 U.S. 230, 236 (1962). See also, Temple v. United States, 386 U.S. 91 (1967).
8 Furthermore, the obstruction must be "clearly shown." Ex Parte Hudgings, 249 U.S.
9 378, 383 (1919).

11 In United States v. Snyder, 505 F.2d 595 (5th Cir. 1974), cert. denied 420 U.S.
12 993 (1975), the court considered whether a deliberate falsification of financial
13 statement in pre-sentence investigation is a contempt in presence of court. In Snyder,
14 the appellant was convicted of fraud. During his pre-sentence investigation the
15 appellant falsely stated in a financial statement that he had \$68,000 in assets.
16 Apparently the appellant thought that the court would be more lenient to a person with
17 assets. After sentencing, appellant recanted in support of an application for appointed
18 counsel on appeal. The district court then held appellant in contempt for perjury and
19 sentenced him to six months custody. Id. at 601.
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22 Upon appeal, the Fifth Circuit in Snyder discussed In re Michael, supra,
23 Hudgins, supra, and Nye, supra. The Fifth Circuit also noted that the appellant in
24 Snyder had received the same sentence as his co-defendant. Based on that clear
25 precedent requiring misconduct in or near the court (Nye) that actually and clearly
26 obstructs justice (In re Michael and Hudgins), the Fifth Circuit reversed the contempt
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1 case because the appellant had not received a jury trial.

2 Likewise, in this case the Ms. Cintas signed the Cintas Declaration well away
3 from the Court. Furthermore, the statement that this Court found to be perjurious was
4 not directly related to any relief that Bank of America asked for because Application
5 asked for return of Collateral and not the \$98,080.00. In addition, this Court later (but
6 before any suspicions arose about the Cintas Declaration) granted Bank of America all
7 the relief asked for, including the \$98,080.00 Bank of America asked for after the
8 Cintas Declaration. Finally, Bank of America received the \$98,080.00 within days of
9 the final order.

10 Like the defendant in Snyder who received the same sentence despite his lies,
11 the Cintas Declaration did not change the result in this case. Without such clearly
12 shown obstruction of justice, Ms. Cintas may not be punished for contempt without a
13 jury trial. This Court should, therefore, dismiss this case

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17 **IV. CONCLUSION**

18 This Court should dismiss the contempt charge.

19 Dated: November 14, 2001

20 Respectfully submitted,

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Knut S. Johnson
Attorney for NATALIE CINTAS-GLADNICK